

A **ONG SAUT MEE & ORS v. GASING MERIDIAN SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR

LIM CHONG FONG J

[CIVIL SUIT NO: WA-22C-70-09-2019]

27 JANUARY 2021

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***LAND LAW:** Vacant possession – Late delivery – Claim for liquidated damages – Whether substantial part of late completion excusable by reason of force majeure events – Defendant provided layman rudimentary estimate of defendant’s extension of time entitlement – Whether merely impressionistic assessment – Whether inadequate to discharge defendant’s required burden of proof – Whether defendant liable for liquidated damages – Whether plaintiffs prima facie entitled to liquidated damages*

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***TORT:** Trespass – Encroachment – Construction of crib wall encroaching into plaintiffs’ lot – Whether defendant acted honestly, rationally and reasonably in constructing crib wall – Whether complied with road requirement of public authorities – Whether there was breach of implied terms – Whether there was contravention of development laws under Housing Development (Control and Licensing) Act 1966 – Whether plaintiffs’ claim for loss and damages caused by crib wall ought to be rejected*

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***STATUTORY INTERPRETATION:** Housing Development (Control and Licensing) Act 1966 (‘HDA’) – Section 3 – ‘Housing development’ – Whether development project governed by HDA – Whether housing developer ought to comply with statute and regulations*

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The defendant was the original proprietor of 71 bungalow lots. These bungalow lots were planned by the defendant to be developed into a regulated and exclusive residential estate (‘development project’) known as ‘Santuari Park Pantai’. The plaintiffs were interested to construct a family house in the development project and had accordingly, on 25 August 2010, paid to the defendant a deposit of RM50,000 to purchase one of the bungalow lots (‘bungalow lot’) at the purchase price of RM1,441,606. Subsequently, the plaintiffs and the defendant entered into a formal sale and purchase agreement (‘SPA’) and a deed of mutual covenants (‘DMC’) for the bungalow lot. The plaintiffs thereafter paid the balance of the purchase price in full in accordance with the SPA. On 4 March 2015, after having constructed the infrastructure which served the development project, the defendant sent a notice of delivery of vacant possession of the bungalow lot to the plaintiffs. On 24 April 2015, the plaintiffs visited the site and took delivery of vacant possession of the bungalow lot. It was during this site visit that the plaintiffs were made known by the defendant that there was a crib wall retaining structure to support the buffer zone for the access road in Santuari Park Pantai which encroached into the bungalow. The plaintiffs were dissatisfied with the existence of the crib wall and demanded an explanation for the

encroachment as well as payment of reasonable compensation from the defendant. However, the defendant rejected the plaintiffs' demand for compensation on the premise that the crib wall was required by the authority and that the defendant had the sole discretion under the SPA to construct it without the need to first notify or consult the plaintiffs. That aside, the plaintiffs also demanded for payment of compensation from the defendant for late delivery of vacant possession of the bungalow lot to the plaintiffs based on the agreed liquidated damages as stipulated in the SPA. Again, the defendant rejected the plaintiffs' demand for payment of compensation as claimed, in that, a substantial part of the late completion was excusable by reason of *force majeure* events. The defendant conceded that it was only liable for late delivery for a certain number of days. Subsequently, there were exchanges of correspondences and meetings between the parties on both these problems but they could not settle the disputes amicably. In consequence, the plaintiffs instituted this suit in the High Court which was transferred to this Construction Court. The principal issues that required determination were (i) the encroachment of the crib wall ('encroachment issue'); and (ii) the late completion and delivery of the bungalow lot ('LD issue'). However, there was a further preliminary and intertwined issue as to whether the development project was governed by the Housing Development (Control and Licensing) Act 1966 ('HDA') ('HDA issue').

Held (entering judgment for plaintiffs):

- (1) In respect of whether the development project was governed by the HDA, it was indeed so by the definition of 'housing development' in s. 3 of the HDA as it presently stands, particularly, with the omission of the phrase 'by the said landowner or his nominee' *via* the Housing Developers (Control and Licensing) Amendment Act 2007. The defendant in this development project had put for sale more than four lots of land plots with the view of constructing more than four units of housing accommodation. This fitted squarely within the definition of housing development in the HDA based both on the literal as well as purposive interpretation of the statute as summarised in the case of *Tebin Mostapa v. Hulba-Danyal Balia & Anor*. It is no longer necessary that the defendant must also itself construct the physical structure that formed the housing accommodation to constitute housing development. (para 36)
- (2) Since the defendant was a housing developer under the HDA, the defendant must generally therefore comply with the statute and regulations made thereunder. That notwithstanding as to whether the SPA must accordingly comply with reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 ('HDR'), this again depended on the interpretation of the HDA and the relevant regulation itself. There is no provision in the HDA that prescribes the contract of sale.

- A Upon careful reading of regs. 11(1) and (2), there are four statutorily prescribed contract of sale for a specific and distinct type of housing development each and named as Schs. G, H, I and J ('prescribed contracts of sale'). The prescribed contracts of sale do not congruently fit the sale of the bungalow lots in this development project
- B notwithstanding that the development project is a housing development governed by the HDA. Although the HDA had evolved by amendments to now encompass housing development involving sale of land only with the intent to have housing accommodation of more than four units constructed thereon, there was no corresponding provision made in the
- C HDR to prescribe for the contract of sale to keep abreast with the amendments in the HDA. Consequently, if there was no applicable prescribed contracts of sale, the parties were then at liberty to freely agree on the contract which was exactly the case here in respect of both the SPA and DMC. The SPA and DMC executed by the parties were valid and enforceable since they had been freely consented to by the
- D parties. (paras 37-39 & 41, 42)
- (3) The defendant acted honestly, rationally and reasonably in constructing the crib wall within the bungalow lot by complying with the road requirement of the public authorities in the interest of public safety. There was no other practicable alternative measure *in lieu* of the crib
- E wall in view that the defendant acquired the development project with the master plan of the project already approved and final title of the bungalow lots issued by the land registry as made known to the plaintiffs in the SPA. The crib wall which was constructed within the bungalow
- F lot was part of Crib Wall 6 which originally had to be constructed in order to support the road in front of Lot 37245, Lot 37246 and Lot 37247 but had to be extended to Lot 37248 which is the bungalow lot because of site conditions. Lot 37247 and Lot 37248 are located at a part of a hill classified as Class III *in-situ* terrain and changes had to be made to extend Crib Wall 6 into Lot 37248 to allow the gradual merger of the
- G crib wall with the existing ground in Lot 37248. There was therefore no contravention of development laws under the HDA. (paras 52 & 54)
- (4) As to the alleged breach of implied term, the plaintiffs had not satisfactorily established that the term the defendant must not construct any structure on the bungalow lot land without the plaintiffs' prior acceptance and approval on the description and plans of the structure would be implied following the test enunciated by the Federal Court in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong*. This court was not convinced that the plaintiffs' prior acceptance and approval met the officious bystander test because the construction of the structure in the
- H basic works had already been provided which included the crib wall in cl. 12 read together with the Fourth Schedule item (g) of the SPA. This
- I court was plainly not satisfied that the implication of the plaintiffs' prior

acceptance and approval as alleged met the business efficacy test as well as this was not necessary to make the contract work. The SPA was workable in any event without the implication of this particular term. Consequently, in the absence of implication of the term, there could not be a breach committed by the defendant as contended, thereby negating the plaintiffs' claim. The plaintiffs' claim for loss and damages caused by the crib wall must be rejected. (paras 55-58)

- (5) By virtue of the latest Federal Court case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals*, the computation of LD for late completion must be calculated from the date of payment of the booking fee and not from the date of the statutory agreement because the HDA is a social legislation meant to protect purchasers. Notwithstanding that the SPA herein was not a statutory agreement, the defendant and the development project were nevertheless a housing developer and a housing development respectively governed by the HDA. This court was therefore bound to follow the decision of the Federal Court. The contractual date of delivery of vacant possession of the bungalow lot was hence on 24 August 2012. The defendant sent the notice of vacant possession of the bungalow lot dated 4 March 2015 to the plaintiffs. By cl. 13.4 of the SPA, the plaintiffs were deemed to have taken vacant possession of the bungalow lot on 28 March 2015. The defendant had, however, now contended that the parties had, by their conduct, accepted that the actual date of vacant possession of the bungalow lot on 30 September 2014 as proposed in the plaintiffs' letter dated 9 March 2017 to the defendant after several meetings. This was vehemently denied by the plaintiffs by reason that the plaintiffs' proposal was rejected in the defendant's letter dated 18 April 2017 to the plaintiffs. The plaintiffs had, on 24 April 2015, received LD payment of RM39,496.05 from the defendant but it was accepted under protest. There was hence neither any estoppel nor acquiescence by the plaintiffs to their detriment as so contended by the defendant. In the circumstances, the defendant must not blow hot and cold. Consequently, the actual delivery of vacant possession of the bungalow lot by the defendant to the plaintiffs took place on 28 March 2015. (paras 65 & 66)
- (6) The SPA did not provide for an architect or engineer to independently certify the fair and reasonable extension of time for the defendant to deliver vacant possession of the bungalow lot. This certification provision would normally be final and conclusive to avoid dispute between the parties. In the absence of this certification provision, the burden of proof was on the defendant to satisfy this court on the resultant time impact of the cause and effect of the *force majeure* event(s) *vis-a-vis* the whole basic works that had to be done to deliver vacant possession of the housing lots including the bungalow lot. Reading DW1's

- A testimony as well as the supporting documents, he had merely made a lay rudimentary estimate of the defendant's extension of time entitlement. It was in substance an impressionistic assessment of the defendant's entitlement to extension of time of 1,481 mitigating days in the basic works. The supporting documents were primarily unprocessed
- B raw data comprising of correspondences, minutes of meetings, photographs, etc. This impressionistic assessment was inadequate to discharge the defendant's required burden of proof. The defendant had not cogently co-related the 1,481 mitigating days in the basic works to the bungalow lot specifically. Thus, the defendant had not discharged its
- C burden of proof to be excused for late delivery of vacant possession of the bungalow lot of 942 days between 26 August 2012 and 28 March 2015. The defendant was liable to the plaintiffs for LD. (paras 73-77)
- (7) The plaintiffs being the innocent party had satisfactorily proved that there was breach of contract by the defendant as well as that there was
- D a provision in the SPA specifying the sum to be paid upon breach for late delivery of vacant possession of the bungalow lot. Consequently, the plaintiffs were *prima facie* entitled to the LD unless the defendant proved that cl. 13.3 of the SPA was unreasonable. In this regard, the defendant had merely alleged but not proved that the plaintiffs did not suffer any
- E loss or damages occasioned by the late delivery of the bungalow lot. The SPA was drafted by the defendant and thereafter discussed and agreed between the parties. There was no quibble and accordingly no amendment made whatsoever to the LD provision. It did not bode well for the defendant to now contend that the LD provision that was
- F advanced by the defendant itself was unreasonable. (paras 79-81)

Case(s) referred to:

- Abdul Razak Jundar Khan & Ors v. Mustapha Mohammed & Ors* [2020] 2 CLJ 769 CA (*refd*)
- Bhasin v. Hrynew* [2014] SCC 71 (*refd*)
- Braganza v. BP Shipping Ltd and Another* [2015] 4 All ER 639 (*refd*)
- G *Brisdale Resources Sdn Bhd v. Law Kim* [2004] 6 MLJ 76 (*refd*)
- Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors* [2021] 3 CLJ 159 FC (*refd*)
- Cubic Electronics Sdn Bhd (in liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723 FC (*fol*)
- Daya CMT Sdn Bhd v. Yuk Tung Construction Sdn Bhd* [2018] 1 LNS 920 HC (*refd*)
- Energoprojek (M) Holdings v. PP* [1996] 4 CLJ 571 HC (*not foll*)
- H *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415 FC (*refd*)
- ISO Technic Electrical Sdn Bhd v. Calibre M & E Sdn Bhd* [2017] 1 LNS 212 HC (*refd*)
- John Barker Construction Ltd v. London Portman Hotel Ltd* [1996] 83 BLR 31 (*refd*)
- Lebbey Sdn Bhd v. Tan Keng Hong & Anor* [2000] 1 CLJ 136 HC (*refd*)
- Lim Sze On & Ors v. Syarikat Gunung Sejahtera Sdn Bhd* [2009] 4 CLJ 468 FC (*refd*)
- Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720 CA (*refd*)
- I *London C.C. v. Henry Boot & Sons Ltd* [1959] 1 WLR 1069 HL (*refd*)

- Malaysia Land Properties Sdn Bhd v. Tan Peng Foo* [2013] 3 CLJ 663 CA (*refd*) A
- MK Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh* [1985] 1 CLJ 520; [1985] CLJ (Rep) 199 SC (*refd*)
- Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan* [2020] 10 CLJ 732 FC (*refd*)
- PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 FC (*fol*) B
- Projek Lintasan Kota Sdn Bhd v. Wisma Denmark Sdn Bhd & Anor* [2012] 7 CLJ 651 HC (*refd*)
- Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 FC (*refd*)
- Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 2 CLJ 275 HC (*refd*)
- S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305 FC (*refd*) C
- SML Works Sdn Bhd v. YO Leong & Co* [2017] 1 LNS 2208 HC (*refd*)
- Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561 FC (*fol*)
- Legislation referred to:**
- Contracts Act 1950, s. 75
- Housing Development (Control and Licensing) Act 1966, s. 3 D
- Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (2), Schedule G, Schedule H, Schedule I, Schedule J
- For the plaintiffs - Lim Choon Khim, Chin Yan Leng & David Yii Hee Kiat; M/s Chooi, Saw & Lim*
- For the defendant - Wong Guo Bin & Iffah Yahya; M/s Izral Partnership* E
- Reported by Suhainah Wahiduddin*

JUDGMENT

Lim Chong Fong J:

Introduction

[1] This is a trial judgment on a dispute which arose from the purchase of a piece of bungalow lot in a regulated and exclusive residential estate.

[2] The plaintiffs are individuals and siblings with one another.

[3] The defendant is a private limited company involved in the real estate development business. G

Preliminary

[4] In this suit, the plaintiffs claimed against the defendant for damages for breach of contract due to a crib wall built by the defendant encroaching into the plaintiffs' bungalow lot as well as late delivery of the bungalow lot by the defendant. H

[5] The trial of the suit took four days on 15, 17, 21 and 23 July 2020. The trial documents are marked as bundles A to G wherein the documentary evidence are contained in bundles B to G which were consented by the parties to carry status B. Moreover, in the course of the trial, exhs. P1 to D4 have been admitted in evidence. I

- A [6] The parties called the following witnesses to give testamentary evidence:
- (i) Ong Saut Mee (“PW1”), the plaintiff herself;
 - (ii) Wong Tack Loong (“PW2”), a registered valuer;
- B (iii) Tan Kian Chong (“DW1”), a director of the defendant;
- (iv) Lee Chii Leong (“DW2”), the operation manager of Concrib (M) Sdn Bhd; and
- (v) Nagalingam a/l Thandavan (“DW3”), a registered valuer.
- C [7] After the close of trial, the parties exchanged their written submissions in chief and submissions in reply. Oral clarification with counsel was held on 4 December 2020. The parties further exchanged written submission following the pronouncement of the Federal Court case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 FC.
- D [8] Now, after having duly considered all the evidence adduced before me and submissions of counsel, I furnish below my decision together with the grounds of judgment.
- E **Background Facts**
- [9] The defendant is at all material times the original proprietor of 71 bungalow lots located at Bukit Gasing. These housing lots are subject to the category “building” in accordance with the National Land Code.
- F [10] These bungalow lots were planned by the defendant to be developed into a regulated and exclusive residential estate then provisionally known as “Sanctuary Ridge Kuala Lumpur City” (“development project”). The development project has since been renamed and is now known as “Santuari Park Pantai”. The development project involved the development of 71 lots from jungle land into saleable bungalow lots with proper access and
- G municipal services.
- [11] The plaintiffs were interested to construct a family house in the development project and have accordingly on 25 August 2010 paid to the defendant a deposit of RM50,000 to purchase one of the bungalow lots, namely Lot 37248 (“bungalow lot”) at the purchase price of RM1,441,606.
- H The said deposit is non-refundable and to be applied towards part payment of the purchase price.
- [12] Subsequently on 8 September 2010, the plaintiffs and the defendant entered into a formal sale and purchase agreement (“SPA”) and a deed of mutual covenants (“DMC”) for the bungalow lot. Pursuant to the SPA and the DMC, the plaintiffs are bound to use the bungalow lot for the purpose
- I of constructing a bungalow house only.

[13] The plaintiffs thereafter paid the balance of the purchase price in full in accordance with the SPA.

[14] After having constructed the infrastructure which served the development project, the defendant on 4 March 2015 sent a notice of delivery of vacant possession of the bungalow lot to the plaintiffs.

[15] The plaintiffs then on 24 April 2015 visited the site and took delivery of vacant possession of the bungalow lot. It was during this site visit that the plaintiffs were made known by the defendant that there was a crib wall retaining structure to support the buffer zone for the access road in Santuari Park Pantai which encroached into the bungalow lot as depicted in the following photographs:



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A [16] The plaintiffs were dissatisfied with the existence of the crib wall and demanded an explanation for the encroachment as well as payment of reasonable compensation from the defendant.

B [17] However, the defendant rejected the plaintiffs' demand for compensation on the premise that the crib wall was required by the authority and that the defendant had the sole discretion under the SPA to construct it without the need to first notify or consult the plaintiffs.

C [18] That aside, the plaintiffs also demanded for payment of compensation from the defendant for late delivery of vacant possession of the bungalow lot to the plaintiffs based on the agreed liquidated damages as stipulated in the SPA.

D [19] Again, the defendant rejected the plaintiffs' demand for payment of compensation as claimed in that a substantial part of the late completion was excusable by reason of *force majeure* events. The defendant conceded that it is only liable for late delivery for a certain number of days.

[20] There were subsequently exchanges of correspondence and meetings between the parties on both these problems but they could not settle the disputes amicably.

E [21] In consequence, the plaintiffs instituted this suit on 27 July 2018 in the Civil Division of the High Court but which was later transferred to this Construction Court in September 2019.

Issues For Determination

F [22] The principal issues that require determination can be distilled and discerned as follows:

- (i) encroachment of the crib wall ("encroachment issue"); and
- (ii) late completion and delivery of the bungalow lot ("LD issue").

G However based on the way the plaintiffs have pitched their case, there is a further preliminary and intertwined issue as to whether the development project is governed by the Housing Development (Control and Licensing) Act 1966 ("HDA") ("HDA issue").

H [23] I shall deal with the preliminary HDA issue first and followed thereafter by the encroachment issue and LD issue sequentially.

Findings Of The Court

HDA Issue

I [24] The plaintiffs pleaded and contended that the development project is, at all material times, in fact and substance a housing development as defined in the HDA.

[25] According to the plaintiffs, the HDA was originally enacted and cited as the Housing Developers (Control and Licensing) Act 1966. On 9 June 1988, the Housing Developers (Control and Licensing) Amendment Act 1988 (Act A703) came into force and re-defined “housing development” in s. 3 of the HDA as follows with emphasis added by the plaintiffs:

“housing development” means to develop or construct or cause to be constructed in any manner more than four units of housing accommodation and includes the collection of monies or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or the sale of more than four units of housing lots by the landowner or his nominee with the view of constructing more than four units of housing accommodation **by the said landowner or his nominee.**

Subsequently on 31 January 2002, the Housing Developers (Control and Licensing) Amendment Act 2001 (Act A1142) came into force and the HDA, amongst others, was renamed the Housing Development (Control and Licensing) Act 1966. However, the definition of “housing development” remained unchanged. Thus in the Federal Court case of *Lim Sze On & Ors v. Syarikat Gunung Sejahtera Sdn Bhd* [2009] 4 CLJ 468, it was held that the defendant therein is not a housing developer as defined in the HDA notwithstanding the defendant built houses on the housing lots for the plaintiff on land where the defendant was not the proprietor.

In consequence, the Housing Developers (Control and Licensing) Amendment Act 2007 (Act A1289) came into force on 15 February 2007 and s. 3 of the HDA has been further amended as follows with emphasis added by the plaintiffs:

“housing development” means to develop or construct or cause to be constructed in any manner whatsoever more than four units of housing accommodation and includes the collection of moneys or the carrying on of any building operations for the purpose of erecting housing accommodation in, on, over or under any land; or **the sale of more than four lots of land or building lots with the view of constructing more than four units of housing accommodation.**

In addition, “housing accommodation” and “housing developer” have also been defined as follows in s. 3 of the HDA:

housing accommodation includes any building, tenement or messuage which is wholly or principally constructed, adapted or intended for human habitation or partly for human habitation and partly for business premises and such other type of accommodation as may be prescribed by the Minister from time to time to be a housing accommodation pursuant to section 3A;

...

- A “housing developer” means any person, body of persons, company, firm or society (by whatever name described), who or which engages in or carries on or undertakes or causes to be undertaken a housing development.

- [26] The plaintiffs therefore contended that by the deletion of the phrase
B “by the said landowner or his nominee” in the amended definition of
“housing development” in s. 3 of the HDA, the sale of the bungalow lot is
now caught by the HDA because the development project is in substance a
housing development by the defendant. This is corroborated by the fact that
C the plaintiffs must enter into the SPA and DMC simultaneously with the
defendant wherein pursuant to the DMC, the defendant appointed its
controlled company, Sanctuary Ridge Development Sdn Bhd as the manager
to manage and regulate the affairs of Sanctuari Park Pantai under tight control
by them. In addition and very importantly, the plaintiffs must build a
bungalow on the bungalow lot purchased based on the design which must be
first approved by the defendant or its manager as evidenced by the following
D clauses in the SPA and DMC respectively:

SPA

15 Construction of the Building

- 15.1 Commencement of construction work
E (a) The Purchaser shall use its best efforts and endeavours to
commence construction work on the Building within twenty four
(24) months from the Vacant Possession Date.
F (b) The Purchaser shall complete the construction work on the Building
within thirty (30) months starting from the day the construction
work is started or from the expiry of the 24 months from the Vacant
Possession Date, whichever is later.
G (c) If the Purchaser fails to commence and complete the construction
work within the time periods stated in paragraph (a) and (b) of this
clause, the Vendor shall have the discretion, the option to buy back
the Lot from the Purchaser at the Purchase Price less Twenty
percent (20%) of the Purchase Price or at the prevailing market value
as determined by an independent valuer to be appointed by the
Vendor whichever is the lower.
...
H 15.2 The Purchaser to conform to the provisions of any written law
The Purchaser shall at all times in carrying out the construction of the
Building conform to the Development Order and Approved Plans and the
provisions and requirements of any written law for the time being in force
including but not limited to the urban design guidelines, uniform building
I by-laws or such other statutory requirement or guidelines whether or not
having the force of law as prescribed by the Public Authorities. In addition,

the Purchaser shall construct the Building in accordance with the aesthetics and exclusivity of the Project as intended and determined by the Vendor.

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16 Purchaser's Covenants

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The Purchaser hereby agrees, covenants, and undertakes with the Vendor that the Purchaser and the Purchaser's Consultants shall at all times hereafter observe and perform the following restrictions and stipulations:

16.1 Residential building

The Building to be constructed shall be for residential purposes only.

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18 Execution of Deed of Mutual Covenants

(a) For the purposes of maintain and preserving the status, image, character, value and exclusiveness of the Project and the congenial and harmonious occupation and common enjoyment of all lots comprised in the Project, each and every purchaser of a Lot in the Project is required to enter into a Deed of Mutual Covenants for the purposes of regulating the day to day use and enjoyment of the Lot, the Building, the Other Lots with the Vendor or a party nominated by the Vendor.

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(b) The Purchaser hereby covenants that the Purchaser shall simultaneously with the execution of this Agreement, execute the Deed of Mutual Covenants, which shall be in the form and substance as prescribed by the Vendor.

(c) The Purchaser hereby further covenants that if there is any sale or transfer of the Lot from the Purchaser to a subsequent purchaser, the Purchaser will procure the subsequent purchaser to enter into a deed of mutual covenants in the form and substance similar to the Deed of Mutual Covenants executed by the Purchaser or such other form or substance as prescribed by the Vendor.

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DMC

4 Construction Guidelines

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4.1.3 Prior to the commencement of the Construction, the Purchaser shall:

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(a) obtain the Letter of No Objection to Construction from the Proprietor and/or the Manager;

(b) obtain all necessary written permits, approvals, exemptions, and/or waivers from the relevant Public Authorities for the Construction;

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(c) obtain the Approved Plans for the Construction;

- A (d) at least one (1) week prior to the commencement of the Construction, furnish to the Proprietor and/or the Manager the details of the contractor including the servants or agents of the contractor or other persons (s) so engaged or entrusted by the Purchaser to undertake the Construction. The details to be
- B furnished as aforesaid shall include the respective names, identity card numbers, vehicles' registration numbers and such other additional information required by the Proprietor and/or the Manager; and
- (e) pay to the Proprietor and/or Manager the Construction Deposit or such other sums as the Proprietor and/or the manager may at its
- C sole discretion determine from time to time.

...

4.4 Construction Application and/or Renovation Application

- (a) The Proprietor and/or manager may, at its sole discretion, determine any of the following matters:
- D (i) the compliance or non-compliance with the provisions of the Master Scheme of any Construction Application and/or Renovation Application submitted to it;
- (ii) any conditions or requirements under the Construction
- E Guidelines to be complied with;
- (iii) any amendments to the Master Scheme which, in the opinion of the Proprietor and/or Manager, may be necessary or desirable for the operation, improvement or efficacy of the Master Scheme; and
- F (iv) any other matters concerning the Property or the Master Scheme.
- (b) The decision made by the Proprietor and/or Manager shall be final, conclusive and binding on the Purchaser.

G [27] Since the HDA applies to this development project, the plaintiffs further contended that the contract of sale must hence comply with the prescribed statutory forms of contract set out in reg. 11 of the Housing Development (Control and Licensing) Regulations 1989 ("HDR") which provides:

H 11. Contract of sale

- (1) Every contract of sale for the sale and purchase of a housing accommodation with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and where the contract of sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land
- I intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H.

- (1A) Notwithstanding paragraph (1), every contract of sale for build and then sell for a housing accommodation together with the subdivisio-
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al portion of land appurtenant thereto shall be in the
form prescribed in Schedule I and where the contract of sale and
purchase of a housing accommodation in a subdivided building in
the form of a parcel of a building or land intended for subdivision
into parcels, as the case may be, it shall be in the form prescribed
in Schedule J.

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- (3) Where the Controller is satisfied that owing to special circumstances
or hardship or necessity compliance with any of the provisions in the
contract of sale is impracticable or unnecessary, he may, by a
certificate in writing, waive or modify such provisions:

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Provided that no such waiver or modification shall be approved
if such application is made after the expiry of the time stipulated
for the handing over of vacant possession under the contract of
sale or after the validity of any extension of time, if any, granted
by the Controller

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[28] The plaintiffs further contended that the SPA is not as per Schedule
G as prescribed by reg. 11 of the HDR. It is vastly different to the detriment
of the plaintiffs. As the result, offending clauses in the SPA which are
inconsistent with Schedule G are void following the Federal Court cases of
S.E.A. Housing Corp Sdn Bhd v. Lee Poh Choo [1982] CLJ 355; [1982] CLJ
(Rep) 305 and *M. K. Retnam Holdings Sdn Bhd v. Bhagat Singh Surian Singh*
[1985] 1 CLJ 520; [1985] CLJ (Rep) 199. In particular, the plaintiffs relied
on the recent Court of Appeal case of *Loh Tina & Ors v. Kemuning Setia Sdn*
Bhd & Ors and Another Appeal [2020] 7 CLJ 720 where Lee Swee Seng JCA
held as follows:

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[30] Regulation 11(1) of the Regulations is crystal clear in that the SPA
in the prescribed form and in this case, Schedule G is to be used for the
SPA. There is to be no waiver or modification of any of the provisions
of the contract of sale unless there is a certificate in writing granted by
the Controller of Housing for the waiver or modification as provided for
in s. 11(3) of the Regulations. The requirement is so strict that there shall
be no approval of an application for a waiver or modification if such an
application is made after the expiry of the time stipulated for the handing
over of vacant possession under the contract of sale as spelt out in the
proviso to s. 11(3).

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...

[33] The compliance is clearly and manifestly mandatory. It cannot be
optional to the developer and proprietor and the question of consent of
the purchasers does not arise.

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...

- A [69] A developer that deviates from the HDA and the Regulations by modifying the standard statutory form of SPA in Schedule G without a certificate of the Controller approving the modification would be in breach of the HDA and the Regulations.
- ...
- B [93] Learned counsel for the defendants argued that if the court is not with them then the whole SPA is null and void for non-compliance and not just the clause on the granting of a lease.
- [94] With respect we cannot agree. The intention of Parliament was to ensure that the purchasers receive what is provided for in the HDA and the regulations and here it is the housing accommodation and the land on which it has been built been sold and transferred to them and registered in their names.
- C
- ...
- D [98] It is the relevant clauses in the unauthorised modification to the Schedule G SPA that would be null and void. Unlike the Moneylenders Act 1951 that declares all moneylending agreements not in compliance with the Act to be void and unenforceable, neither the HDA nor the Regulations so declare and the intention must be that the Legislature wanted to save that which is in compliance with the prescribed Schedule G contract of sale and only strike down as null and void those clauses
- E that are in contravention of Schedule G.
- [29] Over the other side, the defendant contended that the development project is not a housing development within the intents of the HDA at all because the defendant is not the party that would construct the building on the bungalow lot and collect payment from the plaintiffs for that purpose. It is plain in the SPA and DMC that the construction of the building on the bungalow lot must be undertaken by the plaintiffs themselves who are wholly responsible for all aspects of the design and construction of the building including appointing their own professional consultants and obtaining the necessary approval from the authorities.
- F
- G [30] Moreover, the defendant contended that the plaintiffs who were, at all material times, represented by their solicitors, Messrs. HK Ang & Partners did not raise any concern over the SPA and DMC before executing them including the SPA and DMC complied with the HDA and HDR. The plaintiffs must therefore be estopped from contending otherwise at this late stage following the cases of *ISO Technic Electrical Sdn Bhd v. Calibre M & E Sdn Bhd* [2017] 1 LNS 212; [2017] MLJU 47 and *SML Works Sdn Bhd v. YO Leong & Co* [2017] 1 LNS 2208; [2018] 8 MLJ 7. Both the SPA and DMC were thus executed as freely consented by both parties and must be given effect; see *Projek Lintasan Kota Sdn Bhd v. Wisma Denmark Sdn Bhd & Anor* [2012] 7 CLJ 651; [2012] MLJU 837.
- H
- I

[31] Consequently, the defendant is not a housing developer pursuant to the HDA and the SPA is hence valid and must accordingly be upheld. A

[32] It is plain to me that the resolution of whether the development project and accordingly the SPA fell within the HDA and HDR respectively are both questions of law of statutory interpretation.

[33] In the recent Federal Court case of *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561, Vernon Ong FCJ summarised the principles of statutory interpretation as follows: B

[30] In our opinion, the rules governing statutory interpretation may be summarized as follows. First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the Court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The Court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the Court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the Court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the Court to add or subtract any word; the duty of the Court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the Court “to travel outside them on a voyage of discovery are strictly limited.” Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the Court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the Court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the Court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself. C D E F G H

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- A [34] In my view, the resolution of the questions of law posed entail determining the meaning and interaction of the phrases “housing accommodation”, “housing development” and “housing developer” as ascribed and applied in the HDA and HDR.
- B [35] The common phrase which appears in all three of the aforesaid defined phrases used in the HDA is “housing accommodation” which has itself been defined to include building, tenement or messuage. Building is self explanatory and understood by all. The on-line Cambridge English Dictionary defined tenement as a large building divided into apartments usually in a poor area of the city and the on-line Oxford Dictionary defined messuage as a dwelling house with outbuildings and land assigned to its use.
- C In gist, I construe housing accommodation as the physical structure to be used for housing.
- D [36] Thus in respect of whether the development project is governed by the HDA, I find and hold that it is indeed so by the definition of “housing development” in s. 3 of the HDA as it presently stands particularly with the omission of the phrase “by the said landowner or his nominee” *via* Act A1289. Based on the facts as found, it is plain to me that the defendant in this development project put for sale more than four lots of land plots with the view of constructing more than four units of housing accommodation.
- E This fitted squarely within the definition of housing development in the HDA based both on the literal as well as purposive interpretation of the statute as summarised in the *Tebin Mostapa* case. It is no longer necessary that the defendant must also itself construct the physical structure that formed the housing accommodation to constitute housing development. The case of
- F *Energoprojek (M) Holdings v. PP* [1996] 4 CLJ 571; [1998] 5 MLJ 401 relied by the defendant on the essential elements to constitute housing development which was decided prior to Act A1289 is no longer relevant.
- G [37] Since the defendant is a housing developer under the HDA, the defendant must generally therefore comply with the statute and regulations made thereunder. That notwithstanding and as to whether the SPA must accordingly comply with reg. 11 of the HDR, this again depends on the interpretation of the HDA and the relevant regulation itself. There is no provision in the HDA that prescribes the contract of sale. This is solely found in reg. 11 of the HDR. On my careful reading of regs. 11(1) and (2), I find
- H that there are so far four statutorily prescribed contract of sale for a specific and distinct type of housing development each and named as Schedules G, H, I and J (“prescribed contracts of sale”) respectively. In this regard, Schedule G and Schedule H are applicable for sale and purchase of housing accommodation comprising building with land and comprising subdivided building respectively on the sell then build type of housing development.
- I Likewise, Schedules I and J are applicable for sale of housing accommodation comprising building with land and comprising subdivided building respectively but on the build and then sell type of housing development.

[38] On the facts before me, I find that the prescribed contracts of sale do not congruently fit the sale of the bungalow lots of this development project notwithstanding that the development project is a housing development governed by the HDA as so found by me in para. [36] above. In other words, there is no applicable contract of sale.

A

[39] Although the HDA has evolved by amendments to now encompass housing development involving sale of land only with the intent to have housing accommodation of more than four units constructed thereon, it seems that there is no corresponding provision made in the HDR to prescribe for the contract of sale to keep abreast with the amendments made in the HDA.

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[40] That notwithstanding, I am aware the plaintiffs contended that the SPA of the bungalow lot must still be based on Schedule G. This is unprecedented. It is clear in reg. 11(1) of the HDR that Schedule G is meant to be used only for the sale and purchase of a housing accommodation together with the sub-divisional portion of land appurtenant thereto. Simply put, the housing developer must be selling both land and a building constructed thereon for housing to the purchaser. However, this is plainly not the case here in issue before me.

D

[41] Again in the *Tebin Mostapa* case, it has been stated that the statute has to be read in the correct context. In this connection, I am also aware that the plaintiffs further contended that the SPA must alternatively be based on Schedule G but with the necessary modifications made thereto subject to the prior approval of the Controller. From my review of the HDA and HDR, there is no obligation on the part of the housing developer to do so. This would otherwise be overreaching the statutory intent. Moreover, it will result in much uncertainty and unfairly burdening the housing developer and the Controller to settle the contract of sale. The provisions in Schedule G would require extensive changes before the contract of sale can be utilised for the sale and purchase of housing lot with building constructed by the purchaser instead as is the case of the bungalow lot here. Consequently, if there are no applicable prescribed contracts of sale, I find and hold that the parties are then at liberty to freely agree on the contract which is exactly the case here in respect of both the SPA and DMC.

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[42] In the premises, I therefore find and hold that the SPA and DMC executed by the parties are valid and enforceable since they have been freely consented to by the parties.

H

Encroachment Issue

[43] It is not in dispute that the defendant constructed a crib wall retaining structure which encroached into the bungalow lot.

I

A [44] The plaintiffs contended that by recital D of the SPA, the bungalow lot must be delivered with vacant possession free from encumbrances. This provision has however been breached because of the permanent crib wall encroachment. As the result, the plaintiffs' purpose of maximising the use of the bungalow lot has been compromised as part of the bungalow lot land is now a public amenity.

B [45] Furthermore, the plaintiffs contended that they would unfairly have to be responsible to upkeep and maintain the crib wall in the future because they are now the custodian of the public amenity which supports the buffer zone of the access road that is used by all the residents of Santuari Park Pantai.

C [46] The plaintiffs also contended that the defendant could have utilised discretion reasonably and build the crib wall outside the boundary of the plaintiffs' bungalow lot but the defendant failed to do so to save costs and maximise its profitability.

D [47] The defendant however counter contended that it had the discretion to construct the crib wall pursuant to Schedule 4 of the SPA and the defendant had accordingly in good faith exercised its discretion reasonably in constructing the crib wall which encroached into the bungalow lot following the advice of its professional consultants and directions of public authority agencies. According to the defendant, it had little to no discretion to place the crib wall in the plaintiffs' bungalow lot. In this regard, DW1 testified as follows under examination in chief:

F Although the defendant could foresee that retaining structures would certainly be required by authorities and constructed as part of the hillside Project, the exact placement of the retaining structures could not be comprehensively ascertained at the time the SPA with purchasers of the 1st Phase vacant lots were entered into.

G This is in anticipation of unpredictable site conditions of hilly terrain which have been known to require adjustments to and additional retaining structures, all to ensure slope stability and prevent soil erosion and landslides after works proceed.

H As such the Defendant needed to retain full and sole discretion for the type and placement of resting structures to accommodate the ongoing and changing professional consultants and requirement of authorities as the work progressed. The continuous dialogue, exchange of information, and resultant adjustments are particularly true for hill slope works and necessary for the overall safety of the Project as well as the surrounding neighbourhood.

Additionally, he testified as follows under cross-examination:

I Q: The Defendant decided to build a retaining wall on the Plaintiffs' lot, do you agree?

A: No.

Q: No, why and why not?

A

A: The question of walls is beyond the Defendant in this project. Retaining structures and safety measures are determined by a host of experts, there is almost zero discretion, zero capacity for the Gasing Meridian as the developer to decide anything in relation to the wall. The whole hill has to be considered. You got the consultant engineer that came in, you got the IKRAM that came to do an independent check on that one. You got the Jawatankuasa Sensitif Alam Sekitar at the Wilayah that is also thirteen agencies including NASEC, JKR Cerun, weighing in on this issue. The issue of the wall is determined by experts. I just follow what the experts tell me to do. I have no choice. It's not like I want to do, I do, I do not want to, I do not do. These experts have come to with the perspective of trying to ensure that the development is safe, not just for the owners but the existing residences around it. There are already terrace houses at the bottom of the slope also. So, safety was a major issue. When you ask me a question in that manner, the answer is no, because all these experts are sitting there saying you must do it this way and I said okay.

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...

Q: Right, I think from what I can see, the Plaintiffs' case is that they basically wanted a safe wall to support the road. But the wall got to be outside the boundary. That's what they wanted, right?

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A: Actually, My Lord, all the while I have understood that the type of wall was never an issue. It's just a question of placement.

...

Q: Therefore we are all here?

F

A: I think that then it is also important to consider that factors relate to safety include, for example, the provision of the IKRAM buffer. This is different from the setback. The buffer is essentially creating a wider supported flat surface to enable emergency vehicles to respond to landslides. So, if were to then ask me the question as to whether or not it is possible for the wall to be placed outside their lot while achieving this safety requirement, then this is an unequivocal 'no'. Not possible. The function of the buffer is to provide that margin of safety, can you imagine?

G

Q: To support the road?

H

A: It's to support the road but the buffer is actually a safety requirement, the wall itself is necessary to support the road but the buffer is a safety requirement from IKRAM so it requires the road if you will, the flat part, available to the vehicle to be broader, yeah

[48] Furthermore, the defendant contended that the plaintiffs had, at all material times, never inquired to view the proposed constructional plans including in relation to the retaining wall which were then available. In other words, the plaintiffs were not concerned of it whatsoever.

I

A [49] Finally, the defendant also contended that the plaintiffs failed to adduce any evidence of pecuniary loss and damage suffered by them to sustain their claim.

B [50] I already have found and held in para. [41] above that the SPA is binding on the parties *albeit* the plaintiffs contended to the contrary. Hence, the applicable provision in relation to the encroachment issue is cl. 12 read together with the Fourth Schedule item (g) of the SPA which provides as follows:

12 Basic Works

C 12.1 Vendor to complete Basic Works

- (a) The vendor shall provide for the Basic Works more particularly specified in Schedule 4 in accordance with the requirements and standards of the Public Authorities.

...

D 12.2 Purchaser not to damage Basic Works

- (a) The Purchaser hereby acknowledges that the Basic Works form part of the basic works serving the Other Lots comprised in the Project and hereby agrees and undertakes not to cut, maim, damage, direct, block, obstruct or in any way render the Basic Works unserviceable or only partially serviceable.

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...

FOURTH SCHEDULE

(which is to be taken and construed as an essential part of this Agreement)

F

- (a) Site clearing for the Project
(b) Drains fronting the Lot
(c) Water and sewerage pipes fronting the Lot
(d) Electrical cabling fronting the Lot
(e) Telephone supply main tap-off fronting the Lot
(f) Road Fronting the Lot

G

- (g) Retaining walls, perimeter and other fencing within and/or ancillary to the Lot as determined and/or installed by the Vendor at its sole discretion.

H

I [51] Based on the English case of *Braganza v. BP Shipping Ltd and Another* [2015] 4 All ER 639, Canadian case of *Bhasin v. Hrynew* [2014] SCC 71 as well as the Malaysian Court of Appeal case of *Abdul Razak Jundar Khan & Ors v. Mustapha Mohammed & Ors* [2020] 2 CLJ 769; [2020] 1 MLJ 237, it is implicit that the exercise of discretion must be made rationally as well as in good faith consistent with the contractual purpose so as not to render the terms of the agreement otiose.

[52] The law is thus settled and it is rather a question of fact whether the discretion conferred has been exercised rationally in good faith. I am satisfied with the explanation of DW1 as reproduced *verbatim* in para. [46] above and accordingly find and hold that the defendant acted honestly, rationally and reasonably in constructing the crib wall within the bungalow lot by complying with the road requirement of the public authorities in the interest of public safety. I also noticed there is no other practicable alternative measure *in lieu* of the crib wall in view that the defendant acquired the development project with the master plan of the project already approved and final title of the bungalow lots issued by the land registry as made known to the plaintiffs in the SPA. Delving into specificities, DW1 testified as follows:

Q: ... There was a question posed by My Lord that whether or not the road, which is in front of Lot 37248, whether it could be shifted in any way, let's just say to the right?

A: Cannot. Not possible. All the bungalow titles for this project were created in 1976, 77, this is not a fresh sub-division. There is very very little latitude given to us in terms of how we actually effected infrastructures onto the site. We basically have to work within the boundary that was already present on title. So, you cannot be moving boundary of the road not without all the other lots being affected. Effectively have to do a completely re-subdivision to achieve that. And then also, the utility plot is already owned by the authorities themselves, so the boundary wise cannot be shifted. The boundary lines are control point. They establish the affixed, immovable reference points. The road level is effectively immovable because Bomba sets the gradient as 10 degrees so no matter what, the road flows along the road easement pursuant to the Bomba requirements already. And then the berm cutting on the other side of that is dictated by JKR, used to be 1:1, by the time the project came around they established a safer standard of 1:1.5, so, cannot, the boundaries are like, fixed. Everywhere else that is controlled by those points, boundary line, road level, berm, if there is any gap in between, we have to build the wall ...

Additionally, I paraphrase DW2 that the crib wall which was constructed within the bungalow lot is part of crib wall 6 which originally had to be constructed in order to support the road in front of Lot 37245, Lot 37246 and Lot 37247 but had to be extended to Lot 37248 which is the bungalow lot because of site conditions. According to him, Lot 37247 and Lot 37248 are located at a part of a hill classified as Class III in-situ terrain and changes had to be made to extend crib wall 6 into Lot 37248 to allow the gradual merger of the crib wall with the existing ground in Lot 37248.

[53] The plaintiffs' pleaded case is that the defendant in contravention of development laws and/or breach of implied term of not constructing any structure on the bungalow lot land without the plaintiffs' prior acceptance and approval on the description and plans of the structure caused loss and damage to the plaintiffs due to the defendant's construction of retaining wall

A which took up approximately 145 square metres of the land belonging to the plaintiffs. It is trite that the plaintiffs are bound by their pleadings; see *Iftikar Ahmed Khan v. Perwira Affin Bank Bhd* [2018] 1 CLJ 415 FC.

[54] Based on my findings in para. [49] above, I therefore find and hold that there is no contravention of development laws under the HDA.

B [55] As to alleged breach of implied term, I am not satisfied that the plaintiffs have satisfactorily established that the term the defendant must not construct any structure on the bungalow lot land without the plaintiffs' prior acceptance and approval on the description and plans of the structure would be implied following the test enunciated by the Federal Court in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503. In that case
C Peh Swee Chin FCJ held as follows:

D [1] Implied terms are of three types. The first are those which the court infers from evidence that the parties to a contract must have intended to include in the contract though not expressly set out therein. The second are those that come about by operation of law, whilst the third are ones that are implied by reasonable custom and usage of any market or trade. The implied term contended for in this appeal belongs to the first type.

E [1a] As for the first type of implied term aforesaid, two tests must be satisfied before a court could infer them. The first is subjective in nature, and it is that such a term to be implied must be "something so obvious that it goes without saying, so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provisions for it in the agreement, they would testily suppress him with a common 'Oh, of course'." The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract
F of both parties. Business efficacy means the desired result of the business in question.

[56] In my opinion, I am not convinced that the plaintiffs' prior acceptance and approval met the officious bystander test because the construction of the structure in the basic works has already been provided which included the
G crib wall in cl. 12 read together with the Fourth Schedule item (g) of the SPA. In addition, there is the unqualified cl. 11(a) of the SPA which provides:

11 State and condition of the Lot

H (a) Subject only to the provisions of Clause 10, the Purchaser expressly agrees and accepts and shall be satisfied as to the condition, position, state, nature and character of the Lot. The Purchaser shall not annul this sale or be at any time hereafter to make any claim for damages or compensation on account of any alteration of the condition, position, state, nature and character of the Lot.

I (b) ...

There would be no implication of terms that contradicts or conflicts with the express terms of the contract; see *London C.C. v. Henry Boot & Sons Ltd* [1959] 1 WLR 1069 HL.

A

[57] Be that as it may, I am plainly not satisfied that the implication of the plaintiffs' prior acceptance and approval as alleged met the business efficacy test as well as this is not necessary to make the contract work. The SPA is workable in any event without the implication of this particular term.

B

[58] Consequently in the absence of implication of the term, there could not be a breach committed by the defendant as contended, thereby negating the plaintiffs' claim. It follows that the plaintiffs' claim for loss and damage caused by the crib wall must be rejected.

C

[59] It is hence unnecessary for me to consider and determine the competing valuation on the reduction in property value of the bungalow lot by PW2 and DW3 who are the respective registered valuers appointed by the parties respectively to assist the court in assessing the resultant loss and damage inflicted upon the plaintiffs.

D

[60] Nonetheless and strictly as a matter in passing, I observed that notwithstanding the direct effects of unsightliness and perhaps also minor loss of landscaping possibilities and/or area caused by the encroachment of the rib wall, there is also the indirect effect of the loss of use of approximately 145 square metres of land belonging to the plaintiffs that is presently used as buffer zone for the access road in the Santuari Park Pantai. It is not clear whether the access road is a private road or a public road as defined in the Street, Drainage and Building Act 1974. It is my view that the land which formed the buffer zone ought to be held by the party which has the statutory duty to maintain and upkeep the access road including the crib wall that supports it. This land may hence be acquired from the plaintiffs through direct negotiated purchase or *via* the Land Acquisition Act 1960.

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LD Issue

[61] The plaintiffs basically contended that the bungalow lot was delivered late to them by the defendant. In this regard, it is provided as follows in cl. 13 of the SPA:

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13 Vacant Possession of the Lot

13.1 Delivery of vacant possession

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The Vendor shall deliver vacant possession of the Lot to the Purchaser with the Basic Works duly completed not later than twenty four (24) months from the date of this Agreement. Until such time, the Vendor shall have exclusive occupation and possession of the Lot.

I

A 13.2 Manner of delivery

Subject to the Purchaser having performed and observed all the terms and covenants on its part under this Agreement, the Vendor shall deliver vacant possession of the Lot to the Purchaser. The notice of delivery of vacant possession by the vendor to the Purchaser shall be supported by a certificate signed by the Vendor's Consultant certifying the practical completion of the Basic Works.

B

13.3 Failure to deliver vacant possession

If the Vendor fails to deliver vacant possession of the Lot in accordance with Clause 13.1 above, the Vendor shall pay the Purchaser liquidated damages at the rate of ten per cent (10%) per annum of the Purchase Price calculated on daily basis from the expiry of the due date of delivery of vacant possession to the actual date of delivery of vacant possession of the Lot to the Purchaser.

C

13.4 Purchaser deemed to have taken delivery of vacant possession

Upon the expiry of fourteen (14) Business Days from the date of a notice from the Vendor requesting the Purchaser to take possession of the Lot, the Purchaser shall be deemed to have taken possession of the Lot (whether or not the Purchaser has actually entered into occupation or possession of the Lot) and the Vendor shall not be liable for any loss or damage to the Purchaser thereunder.

D

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...

[62] The plaintiffs contended that the date of delivery of vacant possession of the bungalow lot is on 24 August 2012 being 24 months from the date of the payment of the deposit of RM5,000 which was on 25 August 2010. However, the defendant only delivered vacant possession of the bungalow lot on 24 March 2015. As the result, the delivery of the vacant possession of the bungalow lot is late by 942 days which attracted LD of RM372,052.84 to be paid by the defendant to the plaintiffs.

F

[63] However, the defendant counter contended that the date of delivery of vacant possession of the bungalow lot is instead on 7 September 2012 being 24 months from the date of the SPA which is 8 September 2010. As to the date of the actual delivery of vacant possession of the bungalow lot, the defendant contended that it was on 30 September 2014 as evidenced by the date of the Certificate of Sectional Practical Completion. Consequently but subject to the contractual provision for extension of time, the delivery of vacant possession of the bungalow lot is late by 753 days only. However, the defendant further contended that the defendant is entitled to extension of time due to *force majeure* as provided in cl. 20 of the SPA. As a result, the defendant is wholly excused from paying any LD to the plaintiffs at all.

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[64] The defendant further contended that the plaintiffs are further disentitled to LD by reason of s. 75 of the Contracts Act 1950 because it would not be reasonable compensation. This is because the plaintiffs have not demonstrated any loss or damage suffered by them.

I

[65] In my view, the resolution of this issue necessitates the contractual date of delivery of vacant possession of the bungalow lot to be firstly ascertained and in this regard it would be on or before 7 September 2012 if strictly based on the provision in cl. 3.1 of the SPA. However by virtue of the latest Federal Court case of *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* 01(f) 29-10-2019(W) (19 January 2021), it was held that the computation of LD for late completion must be calculated from the date of payment of the booking fee and not from the date of the statutory agreement because the HDA is a social legislation meant to protect purchasers. Notwithstanding that the SPA herein is not a statutory agreement, the defendant and the development project are nevertheless a housing developer and a housing development respectively governed by the HDA as held by me. I am therefore bound to follow the decision of the Federal Court. The contractual date of delivery of vacant possession of the bungalow lot is hence on 24 August 2012.

[66] The actual date of delivery of vacant possession of the bungalow lot has to be secondly ascertained and this is a question of mixed fact and law as provided in cls. 13.2 and 13.4 of the SPA. The defendant sent the notice of vacant possession of the bungalow lot dated 4 March 2015 to the plaintiffs. By cl. 13.4 of the SPA, the plaintiffs were deemed to have taken vacant possession of the bungalow lot on 28 March 2015. I observed that the defendant has however now contended that the parties have by their conduct accepted that the actual date of vacant possession of the bungalow lot on 30 September 2014 as proposed in the plaintiffs' letter dated 9 March 2017 to the defendant after several meetings. This was vehemently denied by the plaintiffs by reason that the plaintiffs' proposal was rejected in the defendant's letter dated 18 April 2017 to the plaintiffs. I am nonetheless aware that the plaintiffs had on 24 April 2015 received LD payment of RM39,496.05 from the defendant but I am satisfied that it was accepted under protest. There was hence neither any estoppel nor acquiescence by the plaintiffs to their detriment as so contended by the defendant. In the circumstances, I find that the defendant must not blow hot and cold; see *Nabors Drilling (Labuan) Corporation v. Lembaga Perkhidmatan Kewangan Labuan* [2020] 10 CLJ 732 FC. Consequently, I find and hold that the actual delivery of vacant possession of the bungalow lot by the defendant to the plaintiffs took place on 28 March 2015.

[67] Thirdly, I need to determine if the defendant is entitled to any, and if so, how much extension of time to deliver vacant possession of the bungalow lot. In this respect, it is necessary to reproduce cl. 20 of the SPA on *force majeure* relied upon by the defendant which provides:

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A 20. *Force majeure*

The Vendor shall not be liable to the Purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by *force majeure* including but not limited to acts of God, strikes, lockouts, riots, civil commotion, acts of war or the disability of contractors and sub-contractors employed by the Vendor either in commencing, carrying on or completing their work or their failure to obtain any necessary sanction or approval of any Public Authorities or any other circumstances of whatsoever nature beyond the control of the Vendor.

C According to the defendant, the delivery of vacant possession of the bungalow lot was delayed, hindered or prevented by the disability of contractors and sub contractors employed by the defendant either in commencing, carrying on or completing their work or their failure to obtain necessary sanction or approval of the public authorities.

D [68] Clause 20 of the SPA appears to be the reproduction of the same cl. 32 on *force majeure* in the disputed sale and purchase agreement in the Federal Court case of *S.E.A. Housing Corporation Sdn Bhd v. Lee Poh Choo (supra)*. The Federal Court did not however deal with the construction of the clause especially on its ambit and application because the clause was found to have contravened the HDA.

E [69] In the Court of Appeal case of *Malaysia Land Properties Sdn Bhd v. Tan Peng Foo* [2013] 3 CLJ 663, Mah Weng Kwai J (later JCA) after having reviewed the relevant case authorities on *force majeure* held as follows when dealing with the certificate of extension of time consequential to the *force majeure* provision:

F [12] The court is of the view that the certificate is final and conclusive and binding on the respondent for the following reasons:

(a) to begin with, cl. 22.1 of the Sale and Purchase Agreement envisaged and provided for extension of time to be granted by the architect in situations deemed appropriate by the architect;

G (b) notwithstanding that time shall be the essence of the Sale and Purchase Agreement (cl. 8), cl. 22.1 clearly gave the power to grant extension of time to the architect for good reason;

H (c) the *force majeure* clause (cl. 30) is not limited to the general notion of delay caused by “act of God, strikes, lockouts, riots, civil commotion, general chaos and inclement weather” only. The words *force majeure* have been held in many cases to have a more extensive meaning than “act of God” or “vis major”. While the concept of *force majeure* does not encompass conditions of business or economic climate leading to a depressed economy, it would include dislocation of business by various actions and events. (See *Global Destar (M) Sdn Bhd v. Kuala Lumpur Glass Manufacturers Co Sdn Bhd* [2007] 1 LNS 54);

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- (d) counsel for the respondent cited the following cases to stress the point that the reasons given by the architect of (a) delays caused by the contractor(s) involved in the construction and (d) shortage of materials cannot come within the ambit of cl. 30: A
- (i) *Golden Bay Realty Pte Ltd v. Orchard Twelve Investments Pte Ltd* [1990] 1 CLJ 353; [1990] 3 CLJ (Rep) 499 where the Court of Appeal of Singapore held that the *force majeure* clause does not come into play where the delays caused were within the contemplation of the appellant and were within their control. In this case the court held that a vendor is not entitled to claim protection under the force majeure clause if he "had in fact under provided the time required to do the necessary things" nor would the expression "any other cause or causes over which the vendor has no control" be wide enough to excuse the appellant for the delays of their consultants; B
- (ii) *Ararop Development Sdn Bhd v. Leong Chee Kong & Anor* [2008] 1 CLJ 135 where the Court of Appeal held that the delay to deliver vacant possession was not a delay as stipulated by the exclusion clause, ie, cl. 22 of the Sale and Purchase Agreement. The delay was by the appellant's sub-contractors who were under the control of the appellant. C
- For ease of reference, cl. 22 of the Sale and Purchase Agreement is reproduced here: D
- ... Vendor shall not be liable to the purchaser for any failure on its part to fulfil any term herein if such fulfillment is delayed, hindered or prevented by circumstances beyond the Vendor's control including ... delay by the Appropriate Authority(ies) in granting any necessary sanction or approval or in completing their work on the said Land and other circumstances of whatever nature beyond the Vendor's control and E
- (iii) *Getaran Unggul Sdn Bhd v. Syed Ahamed Mohamed Ghani & Anor* [2004] 1 LNS 436 where the High Court held that the stop-work order issued by Majlis Perbandaran Pulau Pinang did not fall within the *force majeure* clause; F
- But it will be noted however, that in none of the above cited cases, was there a clause equivalent to cl. 30 which provided that the certificate was final, conclusive and binding on the respondent; G
- (e) in his submission counsel for the respondent also contended that the appellant had failed to produce documentary evidence to support or justify the reasons stated by the architect in the certificate. This contention, as accepted by the learned judge, is not quite correct as the architect had in his letter dated 16 July 2009 to the appellant (rekod rayuan p. 175) attached a summary stating the reasons for the grant of extension of time to the appellant (see rekod rayuan pp. 176 to 187). The architect had also stated in his letter that "the information could be made available to any particular purchaser who request for it". It is obvious that in this H
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- A case, the respondent did not request for particulars or documents from the appellant and/or the architect to show that there was no basis for the architect to issue the certificate. In the face of the certificate and the conclusive and binding nature of cl. 30 it would have been prudent, indeed incumbent, on the respondent to apply for further and better particulars and/or discovery of documents
- B before the trial. Unfortunately, the respondent did not do so. This is certainly not a case where the court ought to have invoked an adverse inference against the appellant under s. 114(g) of the Evidence Act 1950 for having failed to produce documents in court;
- C (f) as mentioned earlier, a perusal of the cases cited by counsel for the respondent will immediately show that the agreements under consideration by the court in those cases did not contain a "final and conclusive and binding clause" as is applicable in the present case. Quite apart from including the *force majeure* clause in the agreements there was no other provision for the architect or other person on behalf of the vendor/developer, to seek exclusion from liability on the strength of a certificate issued by the architect or a similar person;
- D (g) the court is of the view that in light of the certificate, it is deemed conclusive that the reasons for the delay in the completion and delivery of vacant possession of the unit are as stated in the certificate. The court cannot and is not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of *inter alia*, fraud, misrepresentation or *mala fides*. It is trite that the court should not intervene to rewrite the terms and conditions of the Sale and Purchase Agreement willingly accepted by the respondent when it entered into the agreement with the appellant;
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- F (h) in the case of *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23, Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal said it is for the parties who intend to be bound by mutual obligations to make a contract for themselves. It is outside the scope of judicial power to make one for them and where a contract is couched in unambiguous language, the court must give effect to it. The court must give effect to the plain meaning of the words, no matter how distasteful the result may be (see the *Central Bank of India Ltd Amritsar v. Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288);
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- H (i) on the use of "conclusive evidence clauses" in business and commercial agreements, it was held by Yong Pung How J (as he then was) in the Singapore High Court case of *Bangkok Bank Ltd v. Cheng Lip Kwong* [1989] 1 LNS 134 that where parties agree that a designated person will have power to issue a certificate as evidence of a fact, the issuance by him of the certificate is then conclusive evidence of that fact, as between the parties. The learned judge went on to say that, in the absence of fraud or obvious error on the
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- face of it, a certificate issued under a "conclusive evidence clause" is conclusive of both the liability and the amount of debt". The *Bangkok Bank Ltd* case was later applied by Ramli Ali JC (now JCA) in *Bank of Tokyo - Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474; A
- (j) in the present case, the learned High Court judge fell into error when she rejected the certificate as being invalid on the ground that the reasons stated in the certificate could not be substantiated and thus not conclusive and final; B
- (k) while the court is mindful that a party relying on a *force majeure* clause must prove the facts bringing the case within the clause (see *Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd* [2004] 1 LNS 537), the court is of the view that in the present case the facts relied on by the architect are as contained in his report summary. It is because of the existence of the final and conclusive and binding clause that the court is constrained from determining the reasons proffered by the architect in detail. Suffice to say that unless the respondent can demonstrate that the certificate issued was manifestly erroneous or was issued with *mala fides*, the certificate will have to be accepted by the court; C
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- (l) on this point, the court notes that the respondent apart from pleading in his reply and submitting that there were no events that could come within the *force majeure* clause, did not challenge the validity of the certificate under the final, conclusive and binding effect of cl. 30; E
- (m) counsel for the respondent contended that as the architect's report was issued on 16 July 2009; that is, about one year after the delivery of vacant possession on 1 August 2008, the report was an afterthought and no weight ought to be attached to it. The court is of the view that this argument is without merit as there is no provision in the Sale and Purchase Agreement that requires the appellant to issue the certificate for extension of time before the delivery of vacant possession and further it was stated by the architect (DW2) in evidence that the extension of time could only be made after the project had been completed as time was needed to ascertain the reasons for the delay of the completion of the project. As such it could not be said to have been issued as an "afterthought" after the delivery of vacant possession; F
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- (n) the court is also of the view that there is no ground for the respondent to impugn the certificate on the basis that it is only in the form of a letter from the architect. There is no provision in the Sale and Purchase Agreement or under the law for the certificate issued to be in compliance with a certain standard format. In the absence of any such specific requirement the court sees no reason why it should not accept the architect's letter dated 12 September 2008 as a valid certificate. H
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- A [70] Consequently, I distil that the *force majeure* clause has to be construed no differently from other clauses in the agreement by taking into consideration the context of the agreement as a whole *via* examining the relevant clauses in detail against the backdrop of the relevant factual matrix to decipher the true intent of the parties; see the recent Federal Court case
- B of *Catajaya Sdn Bhd v. Shoppoint Sdn Bhd & Ors* [2021] 3 CLJ 159. In other words, the clause neither needs to be construed narrowly nor widely but ordinarily as so expressed. Nonetheless, the party alleging and relying on the *force majeure* clause bears the burden to prove the applicability of the clause as well the resultant cause and effect of the *force majeure* event(s) provided in the clause.
- C [71] According to the defendant, the occurrences of the *force majeure* events of the disability of contractors and sub-contractors employed by the defendant in the execution of their work or their failure to obtain necessary sanction or approval of any public authorities including the resultant effect
- D have been testified in detail by DW1 based on the input of its professional consultant and contractor. These have however been challenged by the plaintiffs particularly that the professional consultant and contractor were not called upon to testify in court. Simply put, the plaintiffs contended that DW1's testimony is lay and without much direct personal knowledge besides also self-serving in nature.
- E [72] Upon my construction of cl. 20 of the SPA, I am satisfied that the failure of the defendant's contractor Binaform Sdn Bhd to carry out its work timeously due to delay in obtaining earthwork permit, inclement weather, construction of temporary berm drains to avoid landslides, suspension of
- F lorry transport permits, excavation of large amounts of unanticipated hard rocks and undertaking of stabilisation measures and thereafter the failure of the defendant's contractor Concrib (M) Sdn Bhd to also carry out its work timeously due to delay in having to construct additional crib walls and soil nailing work fell within the coverage of the *force majeure* event of "disability
- G of contractors employed by the vendor either in commencing, carrying on or completing their work or their failure to obtain any necessary sanction or approval of any public authorities".
- H [73] I however noticed that the SPA did not provide for an architect or engineer to independently certify the fair and reasonable extension of time for the defendant to deliver vacant possession of the bungalow lot. This certification provision would normally be final and conclusive such as in the *Malaysia Land Properties* case to avoid dispute between the parties.
- I [74] In the absence of this certification provision, the burden of proof is on the defendant to satisfy me on the resultant time impact of the cause and effect of the *force majeure* event(s) *vis a vis* the whole basic works that have to be done to deliver vacant possession of the housing lots including the bungalow lot. In this regard, I expect to be guided by a detail delay analysis

akin to that normally required in a building contract extension of time application; see *Daya CMT Sdn Bhd v. Yuk Tung Construction Sdn Bhd* [2018] 1 LNS 920. The delay analysis must be a logical analysis in a methodical way of the impact which the relevant matters had on the planned works programme. An impressionistic rather than a calculated assessment of the extension of time is not acceptable; see *John Barker Construction Ltd v. London Portman Hotel Ltd* [1996] 83 BLR 31.

[75] I have carefully read DW1's testimony as well as reviewed the supporting documents relied by him but I find that he has merely made a lay rudimentary estimate of the defendant's extension of time entitlement. It is in substance an impressionistic assessment of the defendant's entitlement to extension of time of 1,481 mitigating days in the basic works. The supporting documents are primarily unprocessed raw data comprising of correspondences, minutes of meetings, photographs, etc. This impressionistic assessment is in my view inadequate to discharge the defendant's required burden of proof. There is, in other words, no comprehensive detail delay analysis undertaken by DW1. Normally, the requisite analysis is done by an expert delay analyst who would systematically review the whole history of the project execution and thereafter assess methodically in a scientific way the impact of all relevant delay events against the relevant work programme based on the relevant raw primary data. There may be adjustments made for float, concurrency, mitigation, etc. in the course of the analysis to derive a realistic fair and reasonable extension of time ultimately. This detail exercise has regrettably not been undertaken here. In addition, I find that the defendant has further not cogently co-related the 1,481 mitigating days in the basic works to the bungalow lot specifically.

[76] In the circumstances, I therefore find and hold that the defendant has not discharge its burden of proof to be excused for late delivery of vacant possession of the bungalow lot of 942 days between 26 August 2012 and 28 March 2015.

[77] The defendant is therefore liable to the plaintiffs for LD in the sum of RM372,052.84 being 942 days x RM1,441,606.00/365 days x 10%.

[78] Nonetheless, I am mindful that the defendant has also contended that this sum of RM372,052.84 is not reasonable compensation based on s. 75 of the Contracts Act 1950 as re-interpreted recently by the Federal Court in *Cubic Electronics Sdn Bhd (in liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723 where Richard Malanjum CJ held as follows:

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- A [74] In summary and for convenience, the principles that may be distilled from hereinabove are these:
- B (i) If there is a breach of contract, any money paid in advance of performance and as part-payment of the contract price is generally recoverable by the payer. But a deposit paid which is not merely part-payment but also as a guarantee of performance is generally not recoverable.
- C (ii) Whether a payment is part-payment of the price or a deposit is a question of interpretation that turns on the facts of a case, and the usual principles of interpretation apply. Once it has been ascertained that a payment possesses the dual characteristics of earnest money and part-payment, it is a deposit.
- (iii) A deposit is subject to s. 75 of the Act.
- D (iv) In determining what amounts to "reasonable compensation" under s. 75 of the Act, the concepts of "legitimate interest" and "proportionality" as enunciated in *Cavendish (supra)* are relevant.
- E (v) A sum payable on breach of contract will be held to be unreasonable compensation if it is extravagant and unconscionable in amount in comparison with the highest conceivable loss which could possibly flow from the breach. In the absence of proper justification, there should not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party.
- F (vi) Section 75 of the Act allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable compensation although evidence of that may be a useful starting point.
- G (vii) The initial onus lies on the party seeking to enforce a damages clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.
- H (viii) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.
- I [79] In this case, the plaintiffs being the innocent party have satisfactorily proved that there is breach of contract by the defendant as well as that there is a provision in the SPA specifying the sum to be paid upon breach for late

delivery of vacant possession of the bungalow lot. Consequently, the plaintiffs are *prima facie* entitled to the LD unless the defendant proves that cl. 13.3 of the SPA is unreasonable.

[80] In this regard, I find that the defendant has merely alleged but not proved that the plaintiffs did not suffer any loss or damages occasioned by the late delivery of the bungalow lot. Nevertheless, I noted that the proof of actual loss is no longer a prerequisite but just a relevant consideration in determining enforceability of the LD provision as reasonable compensation based on the *Cubic Electronics* case which departed from the earlier Federal Court decisions.

[81] There are other relevant considerations of legitimate interest and proportionality which would include who drafted the SPA and whether the SPA were negotiated with legal representation. On the facts here, I find that the SPA was drafted by the defendant and thereafter discussed and agreed between the parties facilitated by a solicitor. There was no quibble and accordingly no amendment made whatsoever to the LD provision. It does not bode well for the defendant to now contend that the LD provision that was advanced by the defendant itself is unreasonable.

[82] Be that as it may, I also find that the LD provision particularly the rate per day is similar to that in the standard contract of sale in the HDR. This rate per day has been held reasonable by the court in *Lebbey Sdn Bhd v. Tan Keng Hong & Anor* [2000] 1 CLJ 136; [2000] 1 AMR 156, *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275; [2002] 5 MLJ 497 and *Brisdale Resources Sdn Bhd v. Law Kim* [2004] 6 MLJ 76 and I have no doubt that they were held so on public policy ground. In my view, this has been and should continue to be a relevant consideration because the standardisation of the rate per day must have been made after much study by the Ministry of Housing and Local Government.

[83] In the premises, I therefore maintain that the LD of RM372,052.84 is reasonable compensation. Since the defendant has already paid RM39,496.05 to the plaintiffs, the balance of the LD payable is RM332,556.79 as pleaded by the plaintiffs.

Conclusion

[84] For the foregoing reasons, I therefore enter judgment for the plaintiffs against the defendant in the sum of RM332,556.79 with interest at 5% per annum thereon from 27 July 2018 till full realisation and costs of RM30,000 subject to the usual allocator.

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